NO. 83-1447

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

BIRMINGHAM LINEN SERVICE,
Petitioner,

v.

NORA C. BELL,
Respondent.

Brief in Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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STATEMENT OF THE CASE

The petition does not accurately or completely describe the facts or the proceedings involved in the current case. In order to properly understand the posture of the current case, a restatement of the facts is necessary.

FACTS

At the very moment that she was rejected for promotion, the plaintiff was told by the defendant's manager that he would not put her in the Washroom because if he did "every woman in the plant would want to go into the Wash-

room". (App. D.6 and B.5.) The district court found this as a fact and the Court of Appeals concurred. (App. D.6 and B.5.) The Arbitrator and the E.E.O.C. made similar findings on the basis of substantially the same evidence. (Pl. Ex. 6 & 10). The Petition to this Court does not deny that this statement was made to the plaintiff at the moment she was rejected for the promotion. It prefers, instead, to characterize its comment as a mere "anecdote". The statement to the plaintiff, of course, was not merely an anecdote but constituted direct evidence of intent to sexually discriminate. It cannot be lightly brushed aside by labeling it as "anecdotal evidence".

The plaintiff, Nora Bell, has been employed by the defendant for 23 years. (Tr. 137). During that period she has been confined to the predominantly female jobs and departments. The defendant has not had a female employee assigned to the higher paying Washroom Department "in over thirty years". (R. 91; Tr. 8, 33, 52). The defendant's departments and jobs within departments are predominantly segregated along sexual lines with women having the lower paying less desirable jobs and departments. (Pl. Ex. 12, 13, 14, 16).

In March, 1977 a vacancy was created in the all male Washroom Department by the retirement of Richard Day. (Tr. 66, 71, 234). The vacancy was in the Washman job classification, which was the highest paying hourly job in the plant. The defendant assigned an incumbent male in the department, Waddell Mason, to the vacancy without posting it for bid even though the collective bargaining agreement required that it be posted and bid according to plant seniority. (Tr. 236, 48, 328; PX 2, pp. 19-20).

It was not until July 12, 1977 that the defendant finally posted the Washman vacancy for bid. (Pl. Ex. 7). Three male incumbents from the department bid on the job in

addition to the plaintiff before the posting was removed on July 18, 1977. (Pl. Ex. 7; Pl. Ex. 13; Tr. 347-348). From that date until Friday, August 5, 1977, the defendant continued to have Waddell Mason perform the Washman job even though the plaintiff was the senior bidder. (Tr. 49, 236, 328, 348-349, 356; Pl. Ex. 13).

The defendant awarded the Washman vacancy to Waddell Mason without announcing that fact to anyone. (Tr. 328, 348-349, 356, 147-148). After several weeks passed without any announcement of the award, the plaintiff went to her Union representative. (Tr. 147-148). The Union representative and the plaintiff met with the Company on Friday, August 5, 1977 and complained that the plaintiff should have been awarded the job because she had the greatest seniority. (Tr. 49-51, 142, 328). The Company relented and agreed to put the plaintiff on the Washman job the following Monday. (Tr. 49-51, 328). As the district court found, however, the movement of the plaintiff into the job of Washman "was done reluctantly because of the fact that she had seniority". (Tr. 455). The district court also found that the job vacancy had been posted with the "desire and the expectation that the job would be awarded to Mr. Mason who was a male employee". (Tr. 454-455; R. 92-93).

On Monday, August 8, 1977, the plaintiff was allowed to suit - up and enter the Washroom. When she arrived, however, she was told that she was not allowed to do the job of Washman but could do the Puller-Loader job, which was a lesser paying, more strenuous and less desirable job. (Tr. 142-143, 145-146, 195, 202-203, 70-71, 93, 99, 234, 288, 224, 277-278). The male bidder (Waddell Mason), who had been performing the job since it became vacant in March, came up to the plaintiff and told her that pulling and loading was not a part of the Washman job and that

she should be doing only Washman duties. (Tr. 143, 100, 70-75). The plaintiff then told Mr. Westbrook, the Production Manager, that she did not bid on Puller and Loader and was not supposed to do the tasks associated with the Puller Loader job. (Tr. 142-143, 146, 74, 288). Mr. Westbrook responded that if she did not want a Puller-Loader job then she would just have to see Mr. Jones, who was the Plant Manager. (Tr. 146-147, 199-200). She talked with Mr. Jones and he told her that she could only have the Puller-Loader job because Waddell Mason was taking the Washman job. (Tr. 146-147). He also told her to return to Mr. Westbrook and discuss it with him. (Tr. 146-147, 142-143). She returned to Mr. Westbrook[1] and was told, according to the district court's findings, "that he would not put Nora Bell into the Washroom because if he did every woman in the plant would want to go into the washroom".[2] She was then returned to her old job outside the Washroom. (Tr. 146-147, 199-200).

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[1]The evidence showed that Westbrook had stated that he would not have any women in the washroom "several times". (Tr. 143-144). Specifically, he was identified as stating this at the August 4, 1977 meeting with the plaintiff and the Union Steward and the August 8, 1977 meeting with the plaintiff. (Tr. 140-141, 143-144, 188, 209-210; PX 10, p. 2).

[2]The district court recognized that "the evidence was disputed" on this point and that the "demeanor of Gus Westbrook on the stand should be taken into consideration in determining whether his denial is credible". (R. 90-91). After evaluating the evidence, it found that Westbrook made "this statement or a similar statement in substance". The plaintiff and the Union Steward, Georgia Robinson, testified that the statement was made in their presence. (Tr. 143-144, 209-210). A reading of the testimony of Jones and Westbrook, shows that Jones never denied or affirmed that the statement was made and that Westbrook never directly denied that the statement was made. During the arbitration Westbrook was quoted as stating that "'if he placed Nora Bell in the washman's job, every woman in the plant would want to enter the washroom, and there was no way he would permit this to happen'". (Pl.Ex. 10, p. 2). The arbitrator concluded that the plaintiff was denied the Washman's job "because she was of the female sex". (Pl.Ex. 10, p. 5). The E.E.O.C. also found that Westbrook "stated that the selection of the [plaintiff] would open the way for females to be assigned in the Washroom". (Pl.Ex. 6, p. 1).

It was not Waddell Mason's training or experience as a Washman which caused the defendant to so vigorously push his candidacy and selection for the Washman vacancy. The evidence was undisputed that it only took one week to learn the Washman's job. (Tr. 410). The job could be learned from brief periods of watching someone else perform the job. (Tr. 407-408, 410). Waddell Mason, in fact, trained himself. (Tr. 407). The lack of experience in the Washroom was no significant impediment since the other principal job, the Puller-Loader position, was admitted to be so simple that it could be learned in 5 minutes. (Tr. 343-353). More importantly, the defendant admitted that the Puller-Loader job did not provide any training for the higher paying Washman job. (Tr. 353, 240, 411, 407-408). The district court specifically found that "it was not necessary for a person to do 'pulling and loading' to train for the job of washman' and that performing the job of pulling and/or loading had not previously been a criterion for obtaining the job of washman". (R. 88). In regard to the plaintiff herself, the district court found that the plaintiff "was capable of being qualified for the job with reasonable training" and that she "could have learned to be a washman without learning to pull and load". (R. 88, 91).

The defendant admitted that it has difficulty getting bids on the Puller-Loader job because it is "strenuous". (Tr. 277-278). It also pays less than the Washman. The plaintiff, just as all the other employees, never bid on the Puller-Loader job for these reasons. (Tr. 277-278). Since the Puller-Loader job served no training function for the Washman job, and the latter job could be learned in one week through simple observation, there was no reason for the defendant to insist on the plaintiff being a Puller-Loader other than discouraging her from staying in the

Washroom to receive training for the Washman job.[3] On the basis of the evidence, the "pulling and loading" prerequisite placed on the April, 1978 bid posting was nothing more than a continuing attempt to discourage the plaintiff from pursuing entrance to the Washroom.

REASONS FOR DENYING THE WRIT

I. The Decision Below Does Not Place The Burden Of Persuasion On The Defendant Until After A Finding Of Direct Evidence Of Discriminatory Intent Is Made By The Factfinder

The Petition grossly mischaracterizes the decision below. The Eleventh Circuit has not changed the order and allocation of the burden of proof which has been established by this Court for cases involving indirect or circumstantial evidence of discrimination. It has done exactly the opposite. It followed the repeated admonition of this Court that the *McDonnell-Douglas - Burdine* order and allocation of the burden of proof is not applicable to all factual situations or all Title VII cases. *McDonnell Douglas v. Green,* 411 U.S. 792, 802 n.13, 93 S.Ct. 1817, 1824 n.13, 36 L.Ed.2d 668 (1973); *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978); *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253, n.6 101 S.Ct. 1089, 1094 n.6, 67, L.Ed.2d 207 (1981); *Teamsters v. United States,* 431 U.S. 324, 357-359, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977). The decision below specifically states that "[t]he Supreme Court, and

[3]It was in recognition of this fact that the district court found that "the burden was shifted to the defendant to articulate a non-discriminatory reason for its refusal to place plaintiff in the position of 'washman' or its placing increased burdens on the job after plaintiff applied for it". (R. 88). As argued more fully hereinbelow, the district court's order and allocation of proof on this issue was erroneous as a matter of fact and law because it allowed overt sexual discrimination to be rebutted by a mere "articulation" standard that was inapplicable to the case at bar.

this court, have stressed time and again that the four - part *McDonnell Douglas* test for establishing a prima facie case of disparate treatment is not intended to be a Procrustean bed within which all disparate treatment cases must be forced to lie". 715 F.2d at 1556 (App. B. 11).

The Court of Appeals correctly concluded that this is a case in which the *McDonnell Douglas* order and allocation of proof is inapplicable. The decision below states:

> It should be clear that the *McDonnell Douglas* method of proving a prima facie case pertains primarily, if not exclusively, to situations where direct evidence of discrimination is lacking. It would be illogical, indeed ironic, to hold a Title VII plaintiff presenting direct evidence of a defendant's intent to discriminate to a more stringent burden of proof, or to allow a defendant to meet that direct proof by merely articulating, but not proving, legitimate, nondiscriminatory reasons for its action. 615 F.2d at 1556-1557. (App. B. 13).

This holding is fully supported by both common sense and prior precedent. In a case involving direct evidence of discrimination, the application of the *McDonnell Douglas* formula produces an irrational linguistic inquiry. After the employer has been found as a fact to have stated that he rejected the plaintiff because she was a woman, the petitioner herein still wants the court to continue to grapple with the *McDonnell Douglas* formula and the circumstantial evidence of intent for which that formula was designed. The result is a logical absurdity. It makes no sense to continue to inquire into the employer's intent or motivation *after* it has just told you what their intent and motivation was. It is tantamount to asking whether a person *intended to intend* to discriminate. When an employer is found as a fact to have told the plaintiff that she was not wanted because "every woman in the plant would want to go into the

Washroom", as was done herein, it is irrational to continue to inquire into motive or intent. The motive and intent are an explicit part of the finding. At that point, the *McDonnell Douglas* mechanism becomes a superfluous inquiry.

The petitioner does not concern itself with the logical infirmities of the position it takes. It offers no explanation for why an employer should be allowed to hide behind the *McDonnell Douglas* mechanism in a case in which it has been found to have stated its intent to exclude women from the best - paying department in its plant. Instead, the petitioner is content to merely chant the *McDonnell Douglas* formula as if it were a magical incantation which frees all employers from answering for even their admitted sexual biases. When the matter is analyzed separately from the narrow pidgeonholes of *McDonnell Douglas* and its progeny, the illogic of the petitioner's argument becomes readily apparent.

No employer who has been found to have explicitly stated its intent to exclude the plaintiff and other women from an all - male department should be given the opportunity to escape liability by merely "articulating" other reasons for its conduct. The "articulation" standard of rebuttal was crafted in *Burdine, supra,* as a response to the indirect nature of the prima facie case allowed by *McDonnell Douglas.* Because the prima facie case did not involve any direct evidence of intent or motivation, the rebuttal phase of the case did not require the defendant to "prove" that it was actually motivated by the reasons it articulated for its treatment of the plaintiff. The *Burdine* "articulation" standard specifically states that "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons". *Burdine, supra* at 254. As this Court has said several times, the *McDonnell Douglas - Burdine* analysis is merely a means of progressively sharp-

ening the inquiry so that the factfinder eventually is in a position to decide whether there is sufficient *indirect* or circumstantial evidence to conclude that the employer [is] treating 'some people less favorably than others because of their race, color, religion, sex or national origin' ". *United States Postal Service Board v. Aikens*, ... U.S. ....., 31 FEP Cases 609, 611 (1983). The "articulation" standard in *Burdine* is merely one phase of the mechanism for progressively sharpening that inquiry when there is no direct evidence and the court is forced to probe the "sensitive and difficult" question of intent through purely circumstantial evidence.

The Court of Appeals, speaking through Judge Tjoflat, correctly recognized the illogic of progressively sharpening an inquiry into circumstantial evidence in a case in which the district court has found as a fact that the employer stated its intent to exclude women at the very moment it rejected the plaintiff for promotion. The petitioner, on the other hand, refuses to recognize the inherent limitations of the *McDonnell Douglas - Burdine* approach. The petitioner argues that the latter approach should apply to *all* facts and circumstances in Title VII cases and that an employer should never have to do more than "articulate" its position in the lawsuit. The impossibility of such a position is readily apparent. Consider the example used by this Court in *Teamsters v. United States*, 431 U.S. 324, 265-66, 97 S.Ct. 1843, 1870, 52 L.Ed.2d 356 (1977), in which the employer "announce[d] his policy of discrimination by a sign reading "Whites Only" on the hiring - office door". *Id.* at 365. Would the plaintiff be forced to prove a *McDonnell Douglas* prima facie case in circumstances of this sort? More importantly, would the employer be allowed to rebut this evidence by merely "articulating" a reason for its action without proving that it was actually motivated by

such reason in its treatment of the plaintiff? The Civil Rights Act would obviously be a farce and a deception if such a result were to become the law of the land. The petitioner offers no argument or explanation which would even remotely support such an approach to the enforcement of Title VII. This Court implicitly rejected it when it stated in *Teamsters v. United States, supra* at 358, that "[t]he importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act". In a case in which the plaintiff has proven to the satisfaction of the factfinder that the employer announced its policy of discrimination at the very moment that it rejected the plaintiff for promotion, the plaintiff has done more than create an "inference" of discrimination and the entire character of the proceeding shifts away from the question of *violation* of the Act and toward the question of *remedies* for that violation.

The petitioner's argument for the "articulation" standard of *Burdine* is grounded in a refusal to recognize the distinction between the question of what is a *violation* of the Act and the question of what is an appropriate *remedy* for the violation. Once an employer is found to have announced his policy of discrimination at the very moment that the contested employment decision was made, the entire question of whether the Act was violated falls away from the case. The Act is *necessarily* violated in such a case and the only question that remains is one of *remedy*, i.e. should the plaintiff be awarded instatement into the position denied and back-pay. In the remedy phase the employer is permitted by the decision below to prove that the

plaintiff would not have been promoted even in the absence of the announced policy of discrimination, thereby avoiding instatement and back-pay as remedies. In no event, however, should the employer be allowed to have his announced policy of discrimination declared not to be a violation of the Act. Unless the petitioner's position is rejected, that is exactly what this Court will be allowing. Employers will be permitted to avoid a finding that Title VII is violated even where they have been found to have explicitly announced their policy of discrimination. Not only that, but they will be permitted to do so by the very slight "articulation" burden of *Burdine*.

The Court of Appeals was correct in holding that when an employer announces his policy of discrimination explicitly, the ultimate issue of intent to discriminate is proven directly without need of the *McDonnell Douglas* minuet. It was also correct in holding that the employer must *prove* that it would not have selected the plaintiff even in the absence of the announced policy of discrimination in order to avoid back-pay and instatement as remedies. It would be nothing short of bizarre for the Court to have held that the "articulation" burden applies even after an announced policy of discrimination has been found by the district court.

The petitioner's alarm with the implications of the decision below does not survive analysis. First, it argues that the Eleventh Circuit would permit a generalized policy of discrimination to shift the burden of persuasion to the employer. Pet., p. 9. There is nothing in the decision below which supports this notion. The plaintiff proved that the policy of discrimination was announced to the plaintiff as the reason for the exclusion from the Washroom at the very moment that the exclusion took place. 715 F.2d at 1553. (App. B.6.). This is not a case in which the employer announced a policy of discrimination at a time and place re-

mote from the particular employment decision that is the subject of the lawsuit. The announced policy of discrimination was specific and addressed directly to the plaintiff in the midst of her rejection for the promotion that is the subject of this particular lawsuit.[4] For these reasons, the petitioner's argument is rather far - fetched when it states that "[t]he focus of the evidence . . . will no longer be on the alleged discriminatory incident and the motivation of the employer".

Secondly, the petitioner's argument on the difficulty and "uncertainty" in applying the burden of proof imposed in the decision below is also unsupported. Pleading and proving defenses in the alternative is certainly nothing new, especially in non-jury cases. Moreover, this Court in *Burdine* recognized that "although the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful". *Burdine, supra* at 258. Under the decision below, the employer still has that same incentive, but also has an added duty of persuasion in cases involving direct evidence of intent or an announced policy of discrimination. Employers and their attorneys are not so unsophisticated that they cannot identify the relatively few cases in which direct evidence or an announced policy is present and adjust their defense accordingly so that proof is offered on the issue of whether the plaintiff would have been promoted in the absence of the announced policy.

Thirdly, the petitioner is in error to suggest that there is a split among the Circuits and in the Eleventh Circuit on

[4]The petitioner's argument seeks to confuse the current case with those other cases in which direct evidence was presented merely as an "anecdote" collateral to the main factual context of the case. This is not such a case. The announced policy of discrimination was not a mere anecdote unconnected to the main factual events in the case. Rather, the announced policy was the centerpiece of the entire set of factual events on which liability is predicated.

the burden of persuasion applicable in cases involving direct evidence or an announced policy of discrimination. The cases on which it relies involved circumstances where the plaintiff followed the *McDonnell Douglas - Burdine* method of proof and presented direct evidence of bias merely as an anecdotal part of the evidence of pretext. Anecdotes involving sexual bias which are *unconnected* to the employment decision at issue are an appropriate source of evidence on the issue of pretext under *McDonnell Douglas*. Such unconnected anecdotes are indirect or circumstantial evidence which are, of course, exactly what *McDonnell Douglas* was intended to focus on. Those cases cited by the petitioner are not in conflict with the decision below in this regard. The petitioner's argument, however, fails to come to grips with the fact that the current case does not involve a mere unconnected anecdote but rather involves an announced policy of discrimination applied directly to the plaintiff. When this distinction is considered, there is no conflict among the Circuits. The Circuits that have considered the issues involved in the decision below are consistent with it. See e.g., *Muntin v. State of California Parks and Recreation Dept.*, 671 F.2d 360, 362-363 (9th Cir. 1982); *Milton v. Weinberger*, 696 F.2d 94, 98-99 (D.C. Cir. 1982); *Wang v. Hoffman*, 694 F.2d 1146, 1148 n.3 (9th Cir. 1982); *Smith v. Secretary of Navy*, 659 F.2d 1113, 1120 & n.58 (D.C. Cir. 1981); *League of United Latin American Citizens v. City of Salinas Fire Dept.*, 654 F.2d 557, 558 (9th Cir. 1981); *Nanty v. Burrows Co.*, 660 F.2d 1327, 1333 (9th Cir. 1981). See also, *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1362 n.9 (11th Cir. 1982) (Cites *City of Salinas, supra* with approval.). See also, *Lee v. Russell County Bd. of Ed.*, 684 F.2d 769, 774 (11th Cir. 1982); *McCormick v. Attalla County Board of Ed.*, 541 F.2d 1094, 1095 (5th Cir. 1976).

For all the foregoing reasons, the Court of Appeals was correct in holding that an announced policy of discrimination cannot be rebutted by the "articulation" standard of the *McDonnell Douglas - Burdine* line of cases.

II. The Decision Below Did Not Set Aside Factual Findings Of The District Court

The petitioner's entire argument on this point mischaracterizes the ruling of the district court and the Court of Appeals. There is no truth whatsoever to the assertion that the Court of Appeals set aside any of the factual findings of the district court. A simple reading of the decision below dispels the petitioner's entire argument. Circuit Judge Tjoflat specifically stated that the Court was "hampered in our exposition of the events forming the background of this dispute because the district court failed to make findings concerning many of the basic, subsidiary facts which are unclear or disputed in the record". 715 F.2d at 1552 (App. B.4). Despite the infirmity of the findings in the district court, the Court of Appeals *did not* enter its own findings of fact. Instead, it remanded to the district court. In this regard, it stated the following:

> The ultimate question in this case, the existence of discriminatory intent *vel non*, is a factual matter. See, *Pullman-Standard v. Swint*, 456 U.S. 273, 289-90, 102 S.Ct. 1781, 1790-91, 72 L.Ed.2d 66 (1982). Bell urges us to reverse and remand this case for entry of judgment, since the district court's findings are infirm because of its erroneous view of the law and, in her view, 'the record permits only one resolution of the factual issue'. *Id.* at 292, 102 S.Ct. at 1792. We decline Bell's tempting invitation because we believe the district court's factual findings are inadequate to allow us to draw this conclusion.

The Court of Appeals reversed the district court because

it applied an erroneous legal standard to the facts of this case. The decision in *Pullman Standard* says that the case should be remanded for entry of findings by the district court under the correct legal standard. That is exactly what was done in the decision below. There is no reason to grant the Petition in such circumstances. The petitioner's argument on the effect of this Court's ruling in *Pullman Standard v. Swint, supra,* is so broad that if it were adopted it would make it virtually impossible for the Court of Appeals to correct even purely legal errors. The decision in *Pullman Standard* clearly did not go as far as the petitioner now argues.[5]

CONCLUSION

This case is not one that should be reviewed by the Court. The Court of Appeals painstakingly followed the recent authoritative precedent laid down by this Court in *Burdine, Aikens* and *Swint.* There is no conflict among the Circuits in the application of these authorities. Neither is there any aspect of the application of these authorities in the circumstances of this case which merits any further attention by this Court.

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[5]Moreover, the petitioner is now doing what it accuses the Court of Appeals of having done. The effect of it is to reargue the facts to this Court and to ignore the findings of the district court. The bulk of the facts asserted in its Petition are not supported by the district court's findings.